

## ECONOMIC DEVELOPMENT AUTHORITY[261]

### Notice of Intended Action

#### **Proposing rule making related to waivers of enhance Iowa board rules and providing an opportunity for public comment**

The Economic Development Authority hereby proposes to amend Chapter 213, “Enhance Iowa Board: Uniform Waiver and Variance Rules,” Iowa Administrative Code.

#### *Legal Authority for Rule Making*

This rule making is proposed under the authority provided in Iowa Code section 15F.104.

#### *State or Federal Law Implemented*

This rule making implements, in whole or in part, 2020 Iowa Acts, House File 2389.

#### *Purpose and Summary*

Pursuant to Chapter 213 and Iowa Code section 17A.9A, the Enhance Iowa Board (Board) may grant waivers from administrative rules under specific circumstances. 2020 Iowa Acts, House File 2389, amended Iowa Code section 17A.9A to remove references to “variances” and change how agencies report rule waivers that have been granted or denied. The proposed amendments to Chapter 213 conform to the changes implemented by 2020 Iowa Acts, House File 2389. The amendments also clarify that a waiver may be granted only in response to a petition and may not be granted on the Board’s own motion.

#### *Fiscal Impact*

This rule making has no fiscal impact to the State of Iowa.

#### *Jobs Impact*

After analysis and review of this rule making, no impact on jobs has been found.

#### *Waivers*

Any person who believes that the application of the discretionary provisions of this rule making would result in hardship or injustice to that person may petition the Board for a waiver of the discretionary provisions, if any, pursuant to 261—Chapter 213.

#### *Public Comment*

Any interested person may submit written or oral comments concerning this proposed rule making. Written or oral comments in response to this rule making must be received by the Authority no later than 4:30 p.m. on April 13, 2021. Comments should be directed to:

Lisa Connell  
Iowa Economic Development Authority  
1963 Bell Avenue, Suite 200  
Des Moines, Iowa 50315  
Phone: 515.348.6163  
Email: [lisa.connell@iowaeda.com](mailto:lisa.connell@iowaeda.com)

### *Public Hearing*

No public hearing is scheduled at this time. As provided in Iowa Code section 17A.4(1)“b,” an oral presentation regarding this rule making may be demanded by 25 interested persons, a governmental subdivision, the Administrative Rules Review Committee, an agency, or an association having 25 or more members.

### *Review by Administrative Rules Review Committee*

The Administrative Rules Review Committee, a bipartisan legislative committee which oversees rule making by executive branch agencies, may, on its own motion or on written request by any individual or group, review this rule making at its [regular monthly meeting](#) or at a special meeting. The Committee’s meetings are open to the public, and interested persons may be heard as provided in Iowa Code section 17A.8(6).

The following rule-making actions are proposed:

ITEM 1. Amend ~~261~~—**Chapter 213**, title, as follows:

#### **ENHANCE IOWA BOARD: UNIFORM WAIVER AND VARIANCE RULES**

ITEM 2. Amend rule 261—213.1(17A,ExecOrd11) as follows:

**261—213.1(17A,ExecOrd11 15F) Applicability.** This chapter outlines a uniform process for the granting of waivers ~~or variances~~ from rules adopted by the board. The intent of this chapter is to allow persons to seek exceptions to the application of rules issued by the board.

#### **213.1(1) Definitions.**

“Board” or “enhance Iowa board” means the enhance Iowa board established by Iowa Code section 15F.102.

“Person” means an individual, corporation, limited liability company, government or governmental subdivision or agency, business trust, estate, trust, partnership or association, or any legal entity.

“Waiver ~~or variance~~” means an agency action which suspends in whole or in part the requirements or provisions of a rule as applied to an identified person on the basis of the particular circumstances of that person.

#### **213.1(2) Authority.**

a. A waiver ~~or variance~~ from rules adopted by the board may be granted in accordance with this chapter if (1) the board has authority to promulgate the rule from which waiver ~~or variance~~ is requested or has final decision-making authority over a contested case in which a waiver ~~or variance~~ is requested; and (2) no statute or rule otherwise controls the grant of a waiver ~~or variance~~ from the rule from which waiver ~~or variance~~ is requested.

b. No waiver ~~or variance~~ may be granted from a requirement which is imposed by statute. Any waiver ~~or variance~~ must be consistent with statute.

ITEM 3. Amend rule 261—213.2(17A,ExecOrd11) as follows:

**261—213.2(17A,ExecOrd11 15F) Board discretion.** The decision on whether the circumstances justify the granting of a waiver ~~or variance~~ shall be made at the discretion of the board upon consideration of all relevant factors.

**213.2(1) Criteria for waiver ~~or variance~~.** The board may, in response to a completed petition ~~or on its own motion~~, grant a waiver ~~or variance~~ from a rule, in whole or in part, as applied to the circumstances of a specified situation if the board finds each of the following:

a. Application of the rule to the person at issue would result in undue hardship ~~or injustice~~ to that person; and

b. Waiver ~~or variance~~ on the basis of the particular circumstances relative to that specified person would be consistent with the public interest; and

c. Waiver ~~or variance~~ in the specific case would not prejudice the substantial legal rights of any person; and

d. Where applicable, substantially equal protection of public health, safety, and welfare will be afforded by a means other than that prescribed in the particular rule for which the waiver ~~or variance~~ is requested.

In determining whether waiver ~~or variance~~ should be granted, the board shall consider whether the underlying public interest policies and legislative intent of the rules are substantially equivalent to full compliance with the rule. When the rule from which a waiver ~~or variance~~ is sought establishes administrative deadlines, the board shall balance the special individual circumstances of the petitioner with the overall goal of uniform treatment of all licensees, grantees and constituents.

**213.2(2) *Special waiver ~~or variance~~ rules not precluded.*** These uniform waiver ~~and variance~~ rules shall not preclude the board from granting waivers ~~or variances~~ in other contexts or on the basis of other standards if a statute or other board rule authorizes the board to do so, and the board deems it appropriate to do so.

ITEM 4. Amend rule 261—213.3(17A,ExecOrd11) as follows:

**261—213.3(17A,ExecOrd11 15F) Requester's responsibilities in filing a waiver ~~or variance~~ petition.**

**213.3(1) *Application Petition.*** All petitions for waiver ~~or variance~~ must be submitted in writing to the Enhance Iowa Board, 200 East Grand 1963 Bell Avenue, Suite 200, Des Moines, Iowa 50309-1819 50315, Attention: Legal Counsel. Petitions for waiver may be delivered, mailed, or sent by email or other electronic means reasonably calculated to reach the intended recipient. If the petition relates to a pending contested case, a copy of the petition shall also be filed in the contested case proceeding.

**213.3(2) *Content of petition.*** A petition for waiver ~~or variance~~ shall include the following information where applicable and known to the requester (for an example of a petition for waiver ~~or variance~~, see Exhibit A at the end of this chapter):

- a. A description and citation of the specific rule from which a waiver ~~or variance~~ is requested.
- b. The specific waiver ~~or variance~~ requested, including the precise scope and operative period that the waiver ~~or variance~~ will extend.
- c. The relevant facts that the petitioner believes would justify a waiver ~~or variance~~.
- d. A signed statement from the petitioner attesting to the accuracy of the facts provided in the petition, and a statement of reasons that the petitioner believes will justify a waiver ~~or variance~~.
- e. A history of any prior contacts between the board and the petitioner relating to the regulated activity, license, grant, loan or other financial assistance affected by the proposed waiver ~~or variance~~, including a description of each affected license, grant, loan or other financial assistance held by the requester, any notices of violation, contested case hearings, or investigative reports relating to the regulated activity, license, grant or loan within the past five years.
- f. Any information known to the requester regarding the board's treatment of similar cases.
- g. The name, address, and telephone number of any public agency or political subdivision which also regulates the activity in question, or which might be affected by the grant of a waiver ~~or variance~~.
- h. The name, address, and telephone number of any person or entity that would be adversely affected by the grant of a petition.
- i. The name, address, and telephone number of any person with knowledge of the relevant facts relating to the proposed waiver ~~or variance~~.
- j. Signed releases of information authorizing persons with knowledge regarding the request to furnish the board with information relevant to the waiver ~~or variance~~.

**213.3(3) *Burden of persuasion.*** When a petition is filed for a waiver ~~or variance~~ from a board rule, the burden of persuasion shall be on the petitioner to demonstrate by clear and convincing evidence that the board should exercise its discretion to grant the petitioner a waiver ~~or variance~~.

ITEM 5. Amend rule 261—213.4(17A,ExecOrd11) as follows:

**261—213.4(17A,ExecOrd11 15F) Notice.** The board shall acknowledge a petition upon receipt. The board shall ensure that notice of the pendency of the petition and a concise summary of its contents have been provided to all persons to whom notice is required by any provision of law within 30 days of the receipt of the petition. In addition, the board may give notice to other persons. ~~To accomplish this notice provision, the~~ The board may require the petitioner to serve the notice and a concise summary of the contents of the petition on all persons to whom notice is required by any provision of law or who may be impacted by the requested waiver, and provide a written statement to the board attesting that notice has been provided and attach a copy of the notice and summary to the written statement.

ITEM 6. Amend rule 261—213.5(17A,ExecOrd11) as follows:

**261—213.5(17A,ExecOrd11 15F) Board responsibilities regarding petition for waiver or variance.**

**213.5(1) Additional information.** Prior to issuing an order granting or denying a waiver or variance, the board may request additional information from the petitioner relative to the petition and surrounding circumstances. If the petition was not filed in a contested case, the board may, on its own motion or at the petitioner's request, schedule a telephonic or in-person meeting between the petitioner and the board's designee, a committee of the board, or a quorum of the board.

**213.5(2) Hearing procedures.** The provisions of Iowa Code sections 17A.10 to 17A.18A regarding contested case hearings shall apply in three situations: (a) to any petition for a waiver or variance of rule filed within a contested case; (b) when the board so provides by rule or order; or (c) when a statute so requires.

**213.5(3) Ruling.** An order granting or denying a waiver or variance shall be in writing and shall contain a reference to the particular person and rule or portion thereof to which the order pertains, a statement of the relevant facts and reasons upon which the action is based, and a description of the precise scope and operative period of the waiver if one is issued.

**213.5(4) Conditions.** The board may condition the grant of the waiver or variance on such reasonable conditions as appropriate to achieve the objectives of the particular rule in question through alternative means.

**213.5(5) Time for ruling.** The board shall grant or deny a petition for a waiver or variance as soon as practicable but, in any event, shall do so within 120 days of its receipt, unless the petitioner agrees to a later date. However, if a petition is filed in a contested case, the board shall grant or deny the petition no later than the time at which the final decision in that contested case is issued.

**213.5(6) When deemed denied.** Failure of the board to grant or deny a petition within the required time period shall be deemed a denial of that petition by the board.

**213.5(7) Service of order.** Within seven days of its issuance, any order issued under this chapter shall be transmitted to the petitioner or the person to whom the order pertains, and to any other person entitled to such notice by any provision of law.

ITEM 7. Rescind rule 261—213.6(17A,ExecOrd11) and adopt the following new rule in lieu thereof:

**261—213.6(17A,15F) Submission of waiver information.** Within 60 days of granting or denying a waiver, the board shall make a submission on the Internet site established pursuant to Iowa Code section 17A.9A for the submission of waiver information. The submission shall identify the rule(s) for which a waiver has been granted or denied, the number of times a waiver was granted or denied for each rule, a citation to the statutory provisions implemented by the waived rules, and a general summary of the reasons justifying the authority's actions on waiver requests. If practicable, the report shall detail the extent to which granting a waiver has established a precedent for additional waivers and the extent to which the granting of a waiver has affected the general applicability of the rule itself.

ITEM 8. Amend rule 261—213.7(17A,ExecOrd11) as follows:

**261—213.7(17A,ExecOrd11 15F) Voiding or cancellation.** A waiver ~~or variance~~ is void if the material facts upon which the request is based are not true or if material facts have been withheld. The board may at any time cancel a waiver ~~or variance~~ upon appropriate notice if the board finds that the facts as stated in the request are not true, material facts have been withheld, the alternative means of compliance provided in the waiver ~~or variance~~ have failed to achieve the objectives of the statute, or the requester has failed to comply with the conditions of the order.

ITEM 9. Amend rule 261—213.8(17A,ExecOrd11) as follows:

**261—213.8(17A,ExecOrd11 15F) Violations.** Violation of conditions in the waiver ~~or variance~~ approval is the equivalent of violation of the particular rule for which the waiver ~~or variance~~ is granted and is subject to the same remedies or penalties.

ITEM 10. Amend rule 261—213.9(17A,ExecOrd11) as follows:

**261—213.9(17A,ExecOrd11 15F) Defense.** After the board issues an order granting a waiver ~~or variance~~, the order is a defense within its terms and the specific facts indicated therein for the person to whom the order pertains in any proceeding in which the rule in question is sought to be invoked.

ITEM 11. Amend rule 261—213.10(17A,ExecOrd11) as follows:

**261—213.10(17A,ExecOrd11 15F) Appeals.** Granting or denying a request for waiver ~~or variance~~ is final agency action under Iowa Code chapter 17A. An appeal to district court shall be taken within 30 days of the issuance of the ruling in response to the request unless a contrary time is provided by rule or statute.

#### Exhibit A

#### Sample Petition (Request) for Waiver/~~Variance~~

##### BEFORE THE ENHANCE IOWA BOARD

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Petition by (insert name of petitioner)  
for the waiver of (insert rule citation)  
relating to (insert the subject matter).



PETITION FOR  
WAIVER

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Requests for waiver ~~or variance~~ from a board rule shall include the following information in the petition for waiver ~~or variance~~ where applicable and known:

- a. Provide the petitioner's (person asking for a waiver ~~or variance~~) name, address, and telephone number.
- b. Describe and cite the specific rule from which a waiver ~~or variance~~ is requested.
- c. Describe the specific waiver ~~or variance~~ requested; include the exact scope and time period that the waiver ~~or variance~~ will extend.
- d. Explain the important facts that the petitioner believes justify a waiver ~~or variance~~. Include in your answer why (1) applying the rule will result in undue hardship ~~or injustice~~ to the petitioner; and (2) granting a waiver ~~or variance~~ to the petitioner is consistent with the public interest; and (3) granting the waiver ~~or variance~~ will not prejudice the substantial legal rights of any person; and (4) where applicable, how substantially equal protection of public health, safety, and welfare will be afforded by a means other than that prescribed in the particular rule for which the waiver ~~or variance~~ is requested.
- e. Provide history of prior contacts between the board and petitioner relating to the regulated activity, license, grant, loan or other financial assistance that would be affected by the waiver ~~or variance~~; include a description of each affected license, grant, loan or other financial assistance held by the petitioner, any notices of violation, contested case hearings, or investigative reports relating to the regulated activity, license, grant or loan within the past five years.

- f.* Provide information known to the petitioner regarding the board's treatment of similar cases.
- g.* Provide the name, address, and telephone number of any public agency or political subdivision which also regulates the activity in question, or which might be affected by the grant of a waiver ~~or variance~~.
- h.* Provide the name, address, and telephone number of any person or entity that would be adversely affected or disadvantaged by the grant of the waiver ~~or variance~~.
- i.* Provide the name, address, and telephone number of any person with knowledge of the relevant or important facts relating to the requested waiver ~~or variance~~.
- j.* Provide signed releases of information authorizing persons with knowledge regarding the request to furnish the department with information relevant to the waiver ~~or variance~~.

I hereby attest to the accuracy and truthfulness of the above information.

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Petitioner's signature

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Date

Petitioner should note the following when requesting or petitioning for a waiver ~~or variance~~:

1. The petitioner has the burden of proving to the board, by clear and convincing evidence, the following: (a) application of the rule to the petitioner would result in undue hardship ~~or injustice~~ to the petitioner; and (b) waiver ~~or variance~~ on the basis of the particular circumstances relative to the petitioner would be consistent with the public interest; and (c) waiver ~~or variance~~ in the specific case would not prejudice the substantial legal rights of any person; and (d) where applicable, how substantially equal protection of public health, safety, and welfare will be afforded by a means other than that prescribed in the particular rule for which the waiver ~~or variance~~ is requested.

2. The board may request additional information from or request an informal meeting with the petitioner prior to issuing a ruling granting or denying a request for waiver ~~or variance~~.

3. All petitions for waiver ~~or variance~~ must be submitted in writing to the Enhance Iowa Board, 200 East Grand 1963 Bell Avenue, Suite 200, Des Moines, Iowa 50309-1819 50315, Attention: Legal Counsel. If the petition relates to a pending contested case, a copy of the petition shall also be filed in the contested case proceeding.

ITEM 12. Amend **261—Chapter 213**, implementation sentence, as follows:

These rules are intended to implement ~~Executive Order Number 11, Iowa Code chapter 17A,~~ Iowa Code sections 17A.9A and Iowa Code section 15F.102.